Supreme Court, U.S.
FILED
NOV 5 - 2010
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(4)

No. 10-18

IN THE

Supreme Court of the United States

WEBSTER M. SMITH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

I. THIS COURT'S PRECEDENT REQUIRES DE NOVO REVIEW OF CONSTITUTIONAL MIXED QUESTIONS 2

II. THE CIRCUIT CONFLICT WARRANTS RESOLUTION 5

III. THIS CASE IS A GOOD VEHICLE 8

CONCLUSION 12

TABLE OF AUTHORITIES

CASES

Page(s)

Bose Corp. v. *Consumers Union of United States, Inc.*, 466 U.S. 485 (1984) 8

Cooper Industries, Inc. v. *Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001) 9

Davis v. *Alaska*, 415 U.S. 308 (1974) 11, 12

Delaware v. *Van Arsdall*, 475 U.S. 673 (1986) 2, 3, 12

Haynes v. *Washington*, 373 U.S. 503 (1963) 8

Hurley v. *Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995) 8

Lilly v. *Virginia*, 527 U.S. 116 (1999) 4, 8

Mincey v. *Arizona*, 437 U.S. 385 (1978) 8

Olden v. *Kentucky*, 488 U.S. 227 (1988) (per curiam) 3, 12

Ornelas v. *United States*, 517 U.S. 690 (1996) 3, 4

Padilla v. *Kentucky*, 130 S. Ct. 1473 (2010) 9

Redmond v. *Kingston*, 240 F.3d 590 (7th Cir. 2001) 10

Salve Regina College v. *Russell*, 499 U.S. 225 (1991) 4

Snyder v. *Louisiana*, 552 U.S. 472 (2008) 3, 4

Thompson v. *Keohane*, 516 U.S. 99 (1995) 3

TABLE OF AUTHORITIES—Continued

Page(s)

United States v. *Kenyon*, 481 F.3d 1054 (8th Cir. 2007) 5

United States v. *Larson*, 495 F.3d 1094 (9th Cir. 2007) (en banc) 6, 7

OTHER AUTHORITIES

Brief for the United States, *Ornelas* v. *United States*, 517 U.S. 690 (1996) (No. 95-5257), 1996 WL 32744 ..... 3, 4, 8

Brief in Opposition, *Larson* v. *United States*, 552 U.S. 1260 (2008) (No. 07-7481) 7-8

Brief in Opposition, *Oregon* v. *Ice*, 129 S. Ct. 711 (2009) (No. 07-901), 2008 WL 3200260 7

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Respondent provides no persuasive reason to deny review. The relevant charges against petitioner Webster Smith depended entirely on the credibility of SR's assertion that her sexual encounter with him was nonconsensual. The military judge nonetheless restricted the defense's cross-examination of SR about her prior false claim that a consensual sexual encounter was nonconsensual. CAAF rejected Mr. Smith's Confrontation Clause challenge to the restriction, 3-2, after reviewing for abuse of discretion. Under this Court's precedent, however, constitutional claims like Mr. Smith's, which present a mixed question of law and fact, are properly reviewed de novo—for reasons respondent itself has

previously articulated before this Court. Respondent's discussion, moreover, confirms the circuit conflict regarding the proper standard of appellate review in cases like this. That conflict warrants resolution, because the confrontation right is fundamental and because the standard applied often determines the outcome. Finally, contrary to respondent's contention this case is a good vehicle to resolve the conflict. In particular, the strength of Mr. Smith's confrontation claim makes it entirely plausible that the outcome of his appeal would have been different had CAAF exercised plenary rather than deferential review.

I. This Court's Precedent Requires De Novo Review Of Constitutional Mixed Questions

Respondent first argues (Opp. 10-14) that CAAF's use of abuse-of-discretion review was proper. Given the circuit conflict and the issue's importance, certiorari would be warranted even if that assertion were correct. But it is not correct.

Respondent asserts (Opp. 11-12) that deferential appellate review is appropriate in cases like this because the Confrontation Clause gives trial courts "wide latitude" to impose "reasonable" restrictions on cross-examination. *Delaware* v. *Van Arsdall*, 475 U.S. 673, 679 (1986). That simply does not follow. The fact that trial courts may impose a range of restrictions does not mean appellate courts must defer to a trial court's view that a particular restriction is within the permissible range. Discretion to select within a range is different from discretion to determine where the range's boundaries (i.e., the constitutional limits) lie. *Van Arsdall* granted trial courts the former, and thus appellate judges cannot hold a restriction that falls within the permissible range unconstitutional just because they

would not have imposed it. But *Van Arsdall* did not grant trial courts the latter. *See* 475 U.S. at 679-680, *cited in* Pet. 23. To hold otherwise would mean that trial courts can violate the Confrontation Clause so long as the violation is a "reasonable" one. *See* Pet. 22.[1]

Were respondent correct, moreover, that abuse-of-discretion review applies anytime the underlying substantive standard is phrased in "reasonableness" terms (Opp. 14), appellate courts would review Fourth Amendment rulings deferentially. But respondent argued the opposite—and this Court agreed—in *Ornelas* v. *United States*, 517 U.S. 690, 691, 695 n.4 (1995); *see* U.S. Br. 21, *Ornelas* (No. 95-5257), 1996 WL 32744 (espousing de novo review for the "ultimate constitutional question of objective reasonableness").

The Court has likewise mandated de novo review for numerous other mixed questions implicating constitutional rights. *See* Pet. 17-22; U.S. *Ornelas* Br. 20 (citing *Thompson* v. *Keohane*, 516 U.S. 99 (1995)). Ignoring that phalanx of consistent holdings (none of which turned on the underlying substantive standard), respondent cites *Snyder* v. *Louisiana*, 552 U.S. 472 (2008), in arguing (Opp. 12-13) that some constitutional

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[1] Respondent also misstates *Van Arsdall*'s holding. The Court did not hold that the Confrontation Clause is violated "only" if an entire line of cross-examination is prohibited. Opp. 11. It held that a violation occurs when "[a] reasonable jury might have received a significantly different impression of [the witness's] credibility" but for the restriction. 475 U.S. at 680; *see also id.* at 685 (White, J., concurring in the judgment) (describing this as the Court's holding); *Olden* v. *Kentucky*, 488 U.S. 227, 232 (1988) (per curiam) (applying this standard). Respondent's attempt (Opp. 19 n.3) to distinguish two cases cited by amicus NACDL—while ignoring the many others—is therefore unavailing.

questions are reviewed deferentially. *Snyder*, however, involved a question of fact, not a mixed question—hence the Court's review for "clear error." 552 U.S. at 474, 478; *see Ornelas*, 517 U.S. at 694 n.3 ("'Clear error' is a term ... [that] applies when reviewing questions of fact."). Mr. Smith does not contend that factual questions implicating constitutional rights are always reviewed de novo (just the opposite, *see* Pet. 18). He argues, rather, that this Court has consistently required de novo review of mixed questions implicating constitutional rights, and that it should do so again here. *See* U.S. *Ornelas* Br. 29 ("[C]onsiderations favoring de novo review carry special weight where a constitutional right is concerned.").

To be sure, the proper appellate-review standard is determined by the underlying issue. *See* Opp. 12. But that determination is driven not by the substantive standard applied to the issue but by: (1) the nature of the issue itself—whether it is legal, factual, or mixed, and whether it implicates constitutional rights—and (2) the extent to which independent review is necessary to control and clarify the pertinent legal principles. *See, e.g.*, *Salve Regina Coll.* v. *Russell*, 499 U.S. 225, 231-233 (1991); *Lilly* v. *Virginia*, 527 U.S. 116, 136 (1999) (plurality opinion); Pet. 17-18. Those factors, not the applicable substantive standard, determine which tribunal is better suited to address the issue, and hence whether appellate review is plenary or deferential.

Respondent also cites (Opp. 13-14) cases in which this Court reviewed cross-examination restrictions for abuse of discretion. As explained in the petition, however (at 24-26), nothing in those cases indicates that they involved constitutional challenges. Indeed, when the Court later characterized one case's holding as constitutional, it noted the anomaly of that case's deferen-

tial review. *See* Pet. 25. The cases respondent cites, moreover, long pre-date this Court's established jurisprudence regarding the selection of standards of appellate review. If any tension exists between that recent jurisprudence and the cases respondent cites, resolving it is simply another reason to grant review.

II. THE CIRCUIT CONFLICT WARRANTS RESOLUTION

As Mr. Smith explained (Pet. 12-14), a small majority of circuits always review confrontation claims like his for abuse of discretion, while a substantial minority always review de novo. Respondent does not dispute the former point, and the cases it cites (Opp. 15-16) only confirm the latter. *See, e.g.*, *United States* v. *Kenyon*, 481 F.3d 1054, 1063 (8th Cir. 2007) ("[W]here the Confrontation Clause is implicated, we consider the matter *de novo*."); *see also* Pet. 12. The circuit conflict is clear. In fact, respondent never asserts that it does not exist. Respondent argues only that there is no conflict "that warrants further review." Opp. 10; *accord* Opp. 14. That argument lacks merit.

This Court has rejected the notion that deferential and independent review are substantively indistinguishable. *See* Pet. 15. Yet respondent contends that resolution of the circuit conflict is unwarranted because in this context, de novo and deferential review *are* "functional equivalent[s]." Opp. 14; *accord* Opp. 16. That contention rests on respondent's view (Opp. 12, 14) that when the underlying substantive standard is phrased in reasonableness terms, de novo and deferential review are essentially the same. As explained above, that is manifestly incorrect. And NACDL's detailed comparative discussion (Br. 8-19)—which respondent ignores—demonstrates clearly that in this context, the appellate-review standard is critical. A

mature circuit conflict concerning the enforcement of a fundamental constitutional right invoked daily in our criminal-justice system surely warrants resolution by this Court. *See* Pet. 15, 20-21; NACDL Br. 3, 11-12.

Respondent next cites *United States* v. *Larson*, 495 F.3d 1094 (9th Cir. 2007) (en banc), in which the Ninth Circuit held that confrontation claims like Mr. Smith's are sometimes reviewed de novo and sometimes reviewed for abuse of discretion, depending on the severity of the challenged restriction, *see id.* at 1101.[2] As respondent notes (Opp. 16), *Larson* proclaimed that its approach aligned with the circuits that always review de novo in cases like this. *See* 495 F.3d at 1101 n.6. But that is incorrect. Indeed, after observing that Ninth Circuit panels had taken three approaches with claims like Mr. Smith's—de novo review, abuse-of-discretion review, and the hybrid approach—*Larson* explicitly adopted "the third approach," not the first. 495 F.3d at 1101.[3]

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[2] *Larson* recognized the circuit conflict, *see* Pet. 14, without ever suggesting that it viewed de novo and abuse-of-discretion review as "functionally equivalent," Opp. 14.

[3] If respondent means to endorse *Larson*'s approach, that endorsement is misplaced. *Larson*'s rule is easily manipulated. Simply by defining the relevant "area of inquiry" narrowly (or broadly), litigants or courts can declare that an entire area was (or was not) excluded. Furthermore, *Larson*'s premise, that exclusion of an area of inquiry poses a greater threat to confrontation principles, is infirm. Excluding an entire line of marginally relevant questions is significantly less objectionable than, for example, the limited but critical exclusion here. Finally, under *Larson* the applicable standard improperly depends on the severity of the cross-examination restriction. If that were correct, appellate courts would review de novo a trial court's ruling on a First Amendment challenge to a complete ban on certain expression, but review def-

Respondent nonetheless implies (Opp. 16-17) that, in light of *Larson*, Mr. Smith's confrontation claim would be reviewed deferentially in every circuit. Respondent's basis for that suggestion is its assertion (Opp. 18) that the minority circuits employ a "hybrid" approach like *Larson*'s. That is incorrect. Again, *Larson*'s hybrid approach involves applying two different standards to *Confrontation Clause* claims. Circuits in the minority, by contrast, always review confrontation claims de novo, while reviewing non-constitutional challenges to cross-examination restrictions deferentially. *See* Opp. 14-15; Pet. 12. That use of abuse-of-discretion review is irrelevant to the question presented, which concerns confrontation claims.[4] *Larson* simply cannot change the fact that several circuits would review Mr. Smith's claim de novo (respondent cites no case from any of those circuits reviewing such a constitutional claim deferentially). Indeed, *Larson* only deepens the circuit conflict. It provides no basis to deny review.[5]

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erentially when a less severe limitation—such as a time, manner, or place restriction—was at issue. That is wrong. The degree of restriction affects the substantive analysis, not the appellate-review standard.

[4] Likewise irrelevant is respondent's observation (Opp. 14) that all circuits (not surprisingly) apply the substantive confrontation standard adopted in *Van Arsdall*. As discussed, the substantive standard and appellate-review standard are distinct issues.

[5] The denial of certiorari in *Larson* itself (*see* Opp. 10, 16) does not suggest otherwise. There are many reasons to deny review in a particular case, and this Court often grants review on questions after multiple denials. *See, e.g.*, Br. in Opp. 2 n.1, *Oregon* v. *Ice*, 129 S. Ct. 711 (2009) (No. 07-901), 2008 WL 3200260 (listing eight earlier denials of the question presented). In *Larson*, for example, it may have genuinely appeared that the standard of review could not affect the outcome. *See* Br. in Opp. 18-20, *Larson* v. *United*

III. This Case Is A Good Vehicle

Respondent argues finally (Opp. 18-20) that this case is not a good vehicle to address the question presented. That is also wrong.

The fact that CAAF's review was discretionary (Opp. 19-20) is irrelevant. Courts exercising discretionary review are as obligated to apply the proper standard of review as other courts—certainly where, as here, the proper standard is itself a matter of constitutional significance. *See Bose Corp.* v. *Consumers Union of U.S., Inc.*, 466 U.S. 485, 510 (1984) ("The requirement of independent appellate review reiterated in *New York Times Co.* v. *Sullivan* is a rule of federal constitutional law."); *Haynes* v. *Washington*, 373 U.S. 503, 515 (1963) (labeling plenary review a "duty of constitutional adjudication"), *quoted in* U.S. *Ornelas* Br. 29. This Court has repeatedly deemed itself obligated to apply the proper standard when conducting discretionary review. *See Lilly*, 527 U.S. at 136 (plurality opinion) (stating categorically that "courts should independently review" certain Confrontation Clause claims, and applying that instruction itself); *Mincey* v. *Arizona*, 437 U.S. 385, 398 (1978) ("[T]his Court is under a duty to make an independent evaluation" regarding whether statements were constitutionally voluntary.); *Hurley* v. *Irish-Am. Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557, 567-568 (1995) (similar).[6] Mr. Smith is not seeking a "right to de novo review by a second appellate court." Opp. 19. He

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States, 552 U.S. 1260 (2008) (No. 07-7481). As explained below, that is not true here.

[6] That these cases arose from state-court judgments confirms that the standard of review for federal constitutional claims is itself of constitutional dimension.

seeks to have CAAF's discretionary review conducted in accordance with constitutional requirements.

Respondent likewise errs in relying on the fact that the military system provides "two appellate tribunals," one that "conducts de novo review" and one that "primarily exercises discretionary jurisdiction." Opp. 19-20. There is nothing "peculiar" about that (Opp. 19); most state-court systems are structured the same way. And this Court regularly reviews judgments from state supreme courts that, like CAAF, exercised discretionary review. *See, e.g.*, *Padilla* v. *Kentucky*, 130 S. Ct. 1473 (2010). The military setting does not affect the analysis here.

Respondent next questions (Opp. 20) whether CAAF's use of a deferential standard of review was outcome-determinative. Although Mr. Smith need not prove that the standard determined the outcome, *cf. Cooper Indus., Inc.* v. *Leatherman Tool Group, Inc.*, 532 U.S. 424, 441 (2001), there is powerful evidence that it did. Applying highly deferential review, *see* Pet. 15, CAAF affirmed by a single vote. Neither the plurality nor the concurrence, moreover, stated that the standard was irrelevant—a notable omission given that the parties hotly disputed what standard applied. The "indications" respondent points to that the standard did not determine the outcome, by contrast (Opp. 20), are far too equivocal. The plurality and the concurring judge should be taken at their word regarding the standard they applied. And if this Court clarifies that they should have reviewed the matter de novo, in a demonstrably close case there is every reason to believe that the result on remand would be different.

Respondent also notes (Opp. 18-19) that the Coast Guard Court of Criminal Appeals (CCA) affirmed after

reviewing de novo. The CCA's 2-1 affirmance does not demonstrate that all three CAAF judges who voted to affirm would do so upon plenary review. Indeed, Mr. Smith respectfully submits that review of the CCA majority's analysis, *see* Pet. App. 23a-28a—particularly compared with the dissent's, *see* Pet. App. 40a-58a—shows clearly the strength of Mr. Smith's Confrontation Clause claim and hence the likelihood that he would prevail before CAAF under de novo review.

As explained in more detail in NACDL's brief (and Mr. Smith's briefs below), the confrontation challenge here is compelling. The prosecution's case on the relevant charges rested *entirely* on SR's credibility. The defense sought to argue that her encounter with Mr. Smith was consensual, that she fabricated her contrary allegation to avoid being disciplined herself for violating cadet regulations, and that she had recently made a similar false claim about another man. That "commonsense" argument (Pet. App. 21a (dissenting opinion)) would have provided a powerful basis for the members to disbelieve SR—as, indeed, they disbelieved the other women who also accused Mr. Smith of misconduct but whom the defense was permitted to cross-examine fully. As to SR, however, the military judge's restriction on cross-examination eviscerated Mr. Smith's ability to present his defense. *See id.*; Pet. App. 56a-57a (dissenting opinion) (defense theory "of an almost spontaneous consensual encounter with SR would be difficult to believe unless the members were informed of SR's prior false claim and were able to understand the depths of her concern for protecting her career"); Pet. 9-10; NACDL Br. 10 (citing *Redmond* v. *Kingston*, 240 F.3d 590 (7th Cir. 2001) (Posner, J)). The military judge's rationales for the exclusion, moreover, were untenable. *See* NACDL Br. 10-16.

Respondent highlights (Opp. 11) the cross-examination that was allowed. But showing that SR had previously lied in unspecified ways about unspecified misconduct was a vastly less effective way of challenging her credibility than showing that she had recently lied about another consensual-but-proscribed sexual encounter being non-consensual. *See* Pet. App. 19a-20a & n.6 (dissenting opinion); Pet. App. 45a (dissenting opinion) (citing *Davis* v. *Alaska*, 415 U.S. 308, 316-317 (1974)); NACDL Br. 8. Indeed, the nebulous questions and answers that were permitted may only have hurt the defense. *See Davis*, 415 U.S. at 318 ("[With] the limited cross-examination that was permitted, the jury might well have thought that defense counsel was engaged in a speculative and baseless line of attack[.]").[7]

Because SR's credibility—and hence the prosecution's entire case on these charges—would have been significantly diminished by the proposed cross-

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[7] Respondent repeats (Opp. 6, 8) the military judge's and CCA majority's arguments that SR's two assault allegations were significantly different. Those arguments fail. SR did not simply lie to Mr. Smith "*in confidence*." Pet. App. 64a. She knowingly allowed him to repeat her lie to others, thus making her false assault claim public. *See* Pet. App. 3a, 60a. Moreover, there is record evidence that others might have known about SR's encounter with Mr. Smith, giving her a clear motive to make a preemptive false report. *Contra* Opp. 8 (citing Pet. App. 31a). "The record reveals that" law-enforcement interviewed Mr. Smith, "the other person who knew of the [cadets'] encounter," before SR came forward. Pet. App. 52a (dissenting opinion). "Accordingly, the two statements were 'parallel' ... because of the illegality of the encounters and SR's fears that the true facts *could be* discovered." Pet. App. 53a. What weight to give this parallel should have been left to the members. *See* Pet. App. 53a-54a; *Davis*, 415 U.S. at 317.

examination, its exclusion was constitutional error. *See Van Arsdall*, 475 U.S. at 680, *quoted supra* n.1; *Olden*, 488 U.S. at 232 (per curiam); *Davis*, 415 U.S. at 317-318. While review would be warranted in any event to resolve the conflict among the courts of appeals, the strength of Mr. Smith's confrontation claim underscores that this case would be a particularly appropriate vehicle for this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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